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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 303

ANDRE VAN WAGENBERG,
Petitioner,

v.

AINO VAN WAGENBERG,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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v.

AINO VAN WAGENBERG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Andre van Wagenberg hereby prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above entitled case on January 12, 1966.

Opinion Below

The opinion of the Court of Appeals of Maryland is reported at 241 Md. 154, 215 A. 2d 812 (*infra*, p. 1a). The opinion of the Circuit Court for Somerset County, Maryland, (Prettyman, J.) is not reported but may be found *infra* at page 22a.

Jurisdiction

The judgment of the Court of Appeals of Maryland was entered on January 12, 1966 (*infra*, p. 1a).[1] Its order denying rehearing was entered on March 2, 1966. An order was entered on May 24, 1966, by Chief Justice Earl Warren extending the time for filing a Petition for a Writ of Certiorari to June 30, 1966. The jurisdiction of this Court rests on 28 U.S.C. § 1257 (3). See also, *infra*, pages 8-9.

Questions Presented

1. Whether the courts below erred in extending full faith and credit to a default judgment entered in New York on a wife's suit under the "transacts any business" clause of the New York long-arm statute against a nonresident husband who was served in Maryland and whose only act in the State of New York was the signing of a marital separation agreement.

2. Whether the mere execution of a marital separation agreement in New York by a nonresident husband is sufficient in terms of the due process requirements of the United States Constitution to permit the New York courts to assert in personam jurisdiction over him by out-of-state service of process.

Statute Involved

New York Civil Practice Law and Rules
Effective September 1, 1963

§ 302. *Personal Jurisdiction By Acts of Domiciliaries*

(a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary, or

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[1] The practice of the Court of Appeals of Maryland is not to render a judgment separate from the opinion. The directions contained at the conclusion of the opinion constitute the judgment. The directions are executed by the lower court upon receipt of the mandate from the Court of Appeals.

his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

1. transacts any business within the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. owns, uses or possesses any real property situated within the state.

(b) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

Statement

On May 24, 1943, Petitioner and Respondent were married in Washington, D.C. On August 5, 1946, their only child, a daughter, Maria Theresa van Wagenberg, was born (R. 11). Subsequently, while the parties were domiciled in Somerset County, Maryland, where Petitioner conducts his business, marital difficulties arose whereby Respondent moved to Nassau County, New York, and instituted an action for separate maintenance in the Supreme Court for that county (R. 11). At or about the same time, Petitioner commenced a suit for divorce against her in the Circuit Court for Somerset County, Maryland (R. 15-16). With these matters still pending, and while residing, respectively, in Maryland and New York, Petitioner and Respondent on April 25, 1952, entered into a separation agreement, which, to sum, provided for the support and maintenance of Respondent and the parties' minor daughter, Maria. This agreement was prepared by attorneys with offices in New

York City and acknowledged by Petitioner and Respondent before a notary public in and for Queens County, New York (R. 11-15).

In pertinent part, this agreement granted custody of Maria to Respondent and by Paragraph SECOND thereof required Petitioner to pay monthly to Respondent Three Hundred Twenty-Five Dollars ($325.00) for her own support and One Hundred Seventy-Five Dollars ($175.00) for the support of Maria, plus "all extraordinary and unusual medical expenses of the child arising from serious accidents or serious illnesses". To better secure these payments, Paragraph FOURTH of the agreement required Petitioner to maintain on deposit with Fahnestock & Co., a New York investment brokerage house, Two Thousand Dollars ($2,000.00) in cash or marketable securities and to authorize Fahnestock & Co. to pay Respondent her monthly allotment out of such funds upon presentment by her of a sworn statement that such allotment was at least fifteen (15) days overdue. In the event of a withdrawal from the account by Respondent, or a decline in the market value of any deposited securities below the stipulated Two Thousand Dollar ($2,000.00) figure, Petitioner was to make additional contributions sufficient to restore the fund to the full amount provided for.

Thereafter, Respondent filed a cross-bill in the divorce proceeding previously instituted by Petitioner in the Circuit Court for Somerset County. On June 2, 1952, that Court dismissed Petitioner's bill of complaint and granted Respondent a decree of divorce *a vinculo matrimonii* (R. 15-16). The decree further provided for the support and maintenance of Respondent and the daughter, Maria, in the terms spelled out in the separation agreement on April 25, 1952, and in fact ratified and made the agreement a part of the decree (R. 17).

On April 22, 1963, Respondent filed suit in the Supreme Court for New York County, New York, seeking damages for Petitioner's alleged failure to comply with the covenant of the separation agreement of April 25, 1952, requiring payment of "extraordinary medical expenses incurred in behalf of Maria" when she allegedly contracted infantile paralysis (R. 9-10). In her complaint Respondent avered that she had spent Twenty-Five Thousand Dollars ($25,000.00) of which Petitioner had to date paid only Sixty-Five Hundred Dollars ($6,500.00) on account, leaving by her calculations a balance due her of Eighteen Thousand Five Hundred Dollars ($18,500.00) which the Petitioner had refused to pay on the ground that they were not legitimate medical expenses incurred on behalf of Maria. Admitting in her complaint that Petitioner was a resident of Maryland, Respondent had a copy of the Complaint served upon him in Princess Anne, Maryland, on September 13, 1963, by a practicing Maryland attorney pursuant to the authority of section 302 (a)(1) of the New York Civil Practice Law and Rules[2] empowering a court to exercise personal jurisdiction over any non-resident who transacts any business within the state in the same manner as if he were a domiciliary of the state (R. 17-18).[3] Petitioner did not appear or file an answer in the New York proceeding and on November 19, 1963, Justice Street of the Supreme Court for New York County entered judgment for Respondent in the requested amount of Eighteen Thousand Five Hundred Dollars ($18,500.00) plus interest and costs (R. 18-20).

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[2] Hereinafter referred to and cited as CPLR.

[3] CPLR § 313 provides that out-of-state service of process on a nonresident may be made "in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state . . . or by any qualified attorney . . . in such jurisdiction."

On December 26, 1963, Respondent filed suit against Petitioner in the Circuit Court for Somerset County, Maryland, alleging Eighteen Thousand Six Hundred Twenty-Nine Dollars and Ninety-Six Cents ($18,629.96) due and owing by reason of the November 19, 1963, judgment entered in her favor in the Supreme Court for New York County, New York (R. 5-6).

Both the Circuit Court for Somerset County and the Maryland Court of Appeals rejected Petitioner's contention that CPLR 302 (a)(1) was limited to transactions of a commercial nature and that hence the execution of a marital separation agreement did not qualify for jurisdictional purposes. Both courts also rejected Petitioner's contention that the New York jurisdictional law aside, it would be a denial of due process for the New York court to assert jurisdiction over him on the basis of the single, isolated and fortuitous execution of the marital separation agreement in New York.

Reasons For Granting The Writ

Glossing over thirty years of New York legislative and judicial history and pushing well beyond the frontiers of established federal constitutional principles of jurisdiction, the court below finds the execution by Petitioner in New York of a marital separation agreement providing for the support of his minor daughter by payments to his wife of moneys secured by a New York escrow fund to be a "transaction of any business" under the recently enacted New York long-arm statute. The threshold question, therefore, is whether the Maryland court abused the full faith and credit clause of the United States Constitution by giving greater effect to a New York judgment than it would be entitled to in New York. This calls for an evaluation of the New York statute in light of the intent of the New York

legislature in enacting it and the construction given to it by the New York courts in interpreting it.

Assuming applicability of the New York statute, the further constitutional question calls for a determination of the extent to which federal concepts of due process which have allowed expanded state jurisdiction over nonresidents in commercial and tort settings shall apply to individual defendants in inherently non-commercial, non-tort settings, i.e., to the field of domestic relations. On the practical level, the import of both questions is immense. The impetus and rationale to expanded in personam state jurisdiction over nonresidents, especially corporations, has been the increased flow of commerce among the states. *Hanson v. Denckla*, 357 U.S. 235, 250-251 (1958). Apart from this commercial context, in personam state jurisdiction over nonresidents by extrastate service of process to date has been sustained only with respect to activities "that the State treats as exceptional and subjects to special regulation." *Id.* at 252-53.

Further expansion to reach personal, non-commercial, non-tort activities such as marital relationships, whether done openly or done circuitously by dubbing them "business", clearly over-reaches the basic considerations that initiated and have sustained the jurisdictional expansion process. Such further expansion most certainly will impose hardships upon ordinary citizens in the conduct of their everyday affairs and will require formation of new constitutional principles.

The decision being appealed rests on little more than the proposition that any person may be sued on any cause of action in any forum in which he has done any *act* related in any way to the cause of action. To date this has not been the law of the American federal system.

I.

In Granting Full Faith and Credit To The New York Judgment, The Maryland Court of Appeals, Cavalierly Ignored The New York Legislative History, Decided Cases And Legal Writings Demonstrating That Jurisdiction Had Been Erroneously Assumed And The Judgment Improperly Entered

Because Petitioner did not appear in the New York proceeding, the issue of personal jurisdiction over him in New York is not yet foreclosed by principles of *res judicata*. *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931); *Cf., Sherrer v. Sherrer*, 334 U.S. 343 (1948). Rather, he remains entitled to a full and fair trial of the jurisdictional issue, including review in this Court for correction of error. *Ibid. Hanson v. Denckla*, 357 U.S. 235 (1958); *Milliken v. Meyer*, 311 U.S. 457 (1940). It is axiomatic that the right of inquiry is not exhausted by a litigated proceeding in the second forum (Maryland) to which the judgment of a sister state (New York) is brought for enforcement, but includes a right of appeal to this Court for a full review of the decision of the second state.

Review in this Court must be available to insure that the second state has neither improperly denied nor improperly extended full faith and credit by an erroneous construction either of the law of the first forum or of the Fourteenth Amendment. The decisions of this Court make clear that the function of the Court is to make an independent determination of the correctness of the second forum's treatment, both of the initial forum's jurisdictional law and also of federal constitutional limitations on exercise of jurisdiction over nonresidents. *Barber v. Barber*, 323 U.S. 77 (1944); *Adam v. Saenger*, 303 U.S. 59 (1938). Accordingly, the improper assumption of jurisdiction by the New

York court cannot be categorized as a federally-non-reviewable state law issue. Rather, the issue is reviewable here as part of the function of ascertaining the proper scope of full faith and credit.

In a sense, the present case is an analog to *Adam v. Saenger, supra,* wherein Texas denied full faith and credit to a California judgment by giving a narrow construction to the California jurisdictional statute and in effect reading it "through Texas eyes." Reversing, this Court said that "since the existence of the federal right turns on the meaning and effect of the California statute, the decision of the Texas court on that point, whether of law or of fact, is reviewable here." *Id.* at 64. In the instant case, the Maryland Court of Appeals has extended full faith and credit to the judgment of the New York court, but in doing so, as in *Adam v. Saenger,* has necessarily construed the meaning of the New York jurisdictional statute.

The undisputed New York legislative and judicial history of the New York Civil Practice Law and Rules reveals that the conceded expansion of judicial jurisdiction intended by the 1962 act was designed to restate and broaden New York jurisdiction in commercial and tort matters, but not to enact an unrestricted long-arm statute. A brief historical review will serve to delimit clearly the intended reach of the new phrase "transacts any business" which was substituted in 1962 for the previous court-created "doing business" test.[4]

The jurisdictional term "doing business" first acquired precise meaning in New York in *Tauza v. Susquehanna Coal Co.,* 220 N.Y. 259, 115 N.E. 915 (1917) (Cardozo, J.).

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[4] Inasmuch as CPLR did not become effective until September 1, 1963, and service upon Petitioner was effected on September 13, 1963, this case of necessity represents one of the earlier utilizations of the New York long-arm statute.

That decision established the basic criteria of a continuous course of business and a fair measure of permanence as the basis for jurisdiction over foreign corporations. Later cases indicated that the corporate activity would have to be both substantial[5] and related to the corporation's commercial purposes.[6]

That commercial activity should be the touchstone of jurisdiction under the "doing business" test is not surprising in view of its introduction in New York law as a result of efforts to expand jurisdiction over foreign corporations. Commercial activity continued to be the touchstone of jurisdiction when the New York legislature saw fit in 1940 to expand jurisdiction over nonresident individuals. It limited application of new section 229-b of New York's Civil Practice Act to those "who shall engage in business" in New York, and "engage in business" was interpreted to be synonomous with "doing business."[7] Thus, whether referring to nonresident individuals or corporations, the New York courts consistently distinguished between those activities that were essentially

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[5] Holzer v. Dodge Brothers, 233 N.Y. 216, 221, 135 N.E. 268, 269 (1922).

[6] *E.g.*, holding no jurisdiction: Feingold v. Ellam, 138 N.Y.S. 2d 192 (Sup. Ct. Kings Co. 1954) (mere presence or residence of officers or directors); Garson v. Richmond F. & P.R.R., 82 N.Y.S. 2d 637 (Sup. Ct. N.Y. Co. 1948) (presence of president in New York for board meeting); Geller v. Macon D. & S.R.R., 190 Misc. 903, 95 N.Y.S. 2d 818 (N.Y. City Ct. 1947) (seeking advice of lawyer); Faretti v. Tech Laboratories, Inc., 284 App. Div. 904, 134 N.Y.S. 2d 481 (2nd Dep't 1954) (seeking advice of government's contract specialist); Joseph Walker & Sons v. Lehigh Coal and Nav. Co., 8 Misc. 2d 1005, 167 N.Y.S. 2d 632 (Sup. Ct. New York Co. 1957) (maintenance of New York stock transfer agent and bank account for payment of dividends in accordance with rules of New York Stock Exchange).

[7] Debrey v. Hanna, 182 Misc. 824, 45 N.Y.S. 2d 551 (Sup. Ct. New York Co. 1943); Second Prelim. Rep. of the Advisory Committee on Practice & Procedure 462 (N.Y. Legis. Doc. No. 13, 1958).

commercial in the profit sense and those which were not, and limited jurisdiction to the former classification.[8]

Even after this Court's decision in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), establishing a minimum contacts principle, New York's stress on a significant amount of commercial activity as the nexus for jurisdiction over nonresidents continued in fairly stringent form.[9] Efforts persisted however to modify and revise New York's jurisdictional rule. On one hand, motivated by *International Shoe*, there was a desire to lessen the stringency of New York's traditional "doing business" requirement so as to permit jurisdiction to lie with only minimal *commercial* activity.[10] The record is barren of any indication of any desire to go so far as to reach non-commercial transactions. On the other hand, there was a desire to consolidate in one act the several ad hoc jurisdictional statutes covering both commercial and non-commercial activities and to expand the tort concept from specific torts to general torts.[11]

The work was begun by the Advisory Committee on Practice and Procedure, which in 1958 submitted a preliminary report recommending provisions virtually identi-

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[8] See note 6, *supra*. *Compare* Dart v. Fehl, 25 Misc. 2d 51, 205 N.Y.S. 2d 221 (Sup. Ct. Queens Co. 1960) (nonresident administratrix of New York estate — no jurisdiction) *with* Miller v. Swan, 176 Misc. 607, 28 N.Y.S. 2d 247 (N.Y. City Ct. 1941) (nonresident owner of rental houses — jurisdiction).

[9] The New York Court of Appeals found it unnecessary to say "whether and to what extent" the New York test of doing business "may be relaxed in reliance upon Constitutional principles recently announced by the Supreme Court". Melvin Pine & Co. v. McConell, 298 N.Y. 27, 80 N.E. 2d 137 (1948).

[10] N.Y. Law Revision Comm'n Rep. 8 (N.Y. Legis. Doc. No. 65(C) (1959)).

[11] Second Prelim. Rep. of the Advisory Committee on Practice & Procedure 39, 459 (N.Y. Legis. Doc. No. 13, 1958)).

cal to the law subsequently enacted in 1962.[12] Although the purposes of the Committee were only to codify the ad hoc statutes, to create general tort jurisdiction, and to lessen the amount of commercial activity needed to satisfy the doing business test, it did on two occasions use language which taken out of context would support the erroneous conclusion that the Committee intended to embrace the concept of an unrestricted jurisdictional statute applicable to all acts performed in the state by non-domiciliaries. Thus in its 1958 Preliminary Report the Committee did speak of the "adoption of a general provision that courts may obtain personal jurisdiction over a non-domiciliary whose act in the state gives rise to a cause of action."[13] However, associated language in the same report clearly indicates that the Committee's jurisdictional concept was not universal but embraced only three things: business (with retention of some commercial requirement), general torts and real estate transactions.[14]

Similarly, when the Committee explained its modification of New York's traditional, stringent "doing business" requirement, it spoke as follows:

> It is clear that the requirement of doing business with the state, presently found both in the cases in respect to foreign corporations not specifically authorized to do business in New York by compliance with section 210 of the General Corporation Law and in civil practice act section 229-b (nonresident individual doing business within the state), is not essential to the constitutional exercise of personal jurisdiction.[15]

In saying this, the Committee meant not that commercial activity henceforth would entirely be ignored but only

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[12] *Id.* at 38, 39.
[13] *Id.* at 37.
[14] *Id.* at 38.
[15] *Id.* at 39.

that commercial activity of the level formerly denoted by New York's "doing business" concept, taken as a phrase of art, was no longer required for constitutionality in the light of this Court's *International Shoe* ruling. "Transacts any business" thus became the same test in concept less rigorously applied.

This analysis of the breadth of jurisdiction intended is supported by the contemporaneous work and reports of the New York Law Revision Commission. In proposing statutory substitution of the new phrase "transaction of any business" for New York's traditional "doing business" rule, the Commission, like the Committee, motivated by the *International Shoe* decision, desired to authorize New York jurisdiction in situations where the *commercial* activity was too slight to satisfy the "doing business" test.[16]

In short there is nothing in the reports of either the Advisory Committee or the Law Revision Commission to suggest that in substituting "transacts any business" for the earlier "doing business" test, jurisdiction was sought to be extended beyond the established category of traditional commercial activity. Rather the intent was merely to take advantage of the "minimum contacts" rule of the *International Shoe* case and, for the first time since *Tauza,* lessen the amount of *commercial* contact to be required for jurisdiction to lie.

The court below thus clearly misapprehends the legislative scheme when, after referring to the new statutory term "transacts any business" as being "generic and vague" [sic], it states that "[p]aragraph 1 of the statute is not limited in terms to commercial transactions nor does it contain an exclusion of transactions not entered into for profit" (*Infra,* p. 14a). The draftsmanship is hardly sur-

[16] See note 10, *supra.*

prising. Given the derivation of the 1962 statute as outlined above and the continuous understanding that commercial activity was the heart of "doing business", which "transacts any business" sought to modify only quantitatively, not qualitatively, one would not expect the draftsmen to see any need specifically to exclude non-profit or non-commercial transactions from the reach of the modified jurisdictional rule.

Relying heavily on Judge Fuld's opinion in *Longines-Wittnauer Watch Co., Inc. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 209 N.E.2d 68 (1965), the court below took the position that since the husband performed *an act* in New York giving rise to a cause of action, he was within the pale of CPLR 302 regardless of the nature of the act (*Infra*, p. 11a). In so doing, the court below has misconstrued Judge Fuld's use of the word "acts", confused two separate sections of the New York statute and by so doing has given to CPLR 302 an interpretation not intended by the New York legislature. The court below thus said of the *Longines-Wittnauer* decision: "We find it significant that . . . Judge Fuld repeatedly referred . . . to acts done within the state . . . . There is a strong inference, in his analysis, that the phrase 'transaction of any business' includes . . . purposeful activity of any kind within the state" (*Infra*, p. 10a).

Judge Fuld's first use of the word "acts" in his opinion occurs in his quote from *Hanson v. Denckla*, 357 U.S. 250 (1958), in the course of his preliminary review of federal constitutional principles. 15 N.Y.2d at 445, 209 N.E.2d at 71-72. He next used the word when he quoted from the 1958 report of the Advisory Committee on Practice and Procedure. 15 N.Y.2d at 456-57, 209 N.E.2d at 75. But this report does not say that jurisdiction will lie when *any* act is purposely done in New York by a non-domiciliary;

the word "act" refers to the specific acts listed in Section 3.2 (now CPLR 302).[17] The word "act" is used consistently only in *Feathers v. McLucas*, 15 N.Y.2d 443, 209 N.E. 2d 68 (1965), a companion case arising under the new enlarged tort section of CPLR 302, where the precise issue of statutory construction was whether the phrase "commits a tortious act within the state" reached a defendant whose negligent act occurred outside New York. In the other two cases arising under the "transacts any business" section, the traditional requirement of commercial activity continues (and is satisfied) and the only real issue was whether the *amount* of *commercial* activity (i.e. "act") was sufficient to support assertion of judicial jurisdiction. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., supra; Singer v. Walker*, 15 N.Y. 2d 443, 209 N.E. 2d 68 (1965).

While there is no decision of the New York Court of Appeals applicable to this issue, the straightforward legislative history, the New York nisi prius decisions and reviews demonstrate beyond peradventure of doubt that the court below erred. Thus, in *Willis v. Willis*, 42 Misc. 2d 473, 248 N.Y.S.2d 260 (Sup. Ct. New York Co. 1964), the very court which entered the default judgment in the present case, when presented with the situation *as an issue*, could not be persuaded that

> the words "business" as used in Section 302 can be construed to encompass the execution of a separation agreement, but, rather, that the intendment and contemplation of the verbage was in respect to transactions being in a business — a commercial aspect.[18]

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[17] *Supra* note 11 at 38.

[18] See A. Millner Company, Inc. v. Noudar LDA, 24 App. Div. 2d 326, 266 N.Y.S. 2d 289 (1st Dep't 1966). See also Home Crafts, Inc. v. Gramercy Homes, Inc., 41 Misc. 2d 591, 593, 246 N.Y.S. 2d 153, 155 (Dist. Ct. Nassau Co. 1964); Antique & Period Furniture

The *Willis* holding was followed without further discussion in *Durgom v. Durgom*, 262 N.Y.S.2d 874 (N.Y. City Ct. 1965), and has been approved either explicitly or implicitly by every reviewer anticipating or considering the issue.[19] See especially Currie, *The Growth of The Long-Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L. FORUM 533, 575-76, recognizing that the term "transacting any business" contemplates *commercial* matters.

The short of the matter is that the Maryland Court of Appeals, having already committed itself in *Gilliam v. Moog Industries, Inc.*, 239 Md. 107, 111, 210 A. 2d 390, 392 (1965), to interpret the similar Maryland long-arm statute to reach "all out of state persons and corporations which constitutionally could be reached", failed to recognize and make allowance for the more restrained approach of the New York legislature and simply viewed and interpreted the New York statute "through Maryland eyes". To correct the resultant aberration requires this Court's review.

Co., Inc. v. First Nat. City Bank (Sup. Ct. New York Co.) in 151 New York Law Journal, April 15, 1964, p. 15, col. 4 (engagement of New York attorney by nonresident legatee under will probated in New York not transacting business).

[19] Siegel, *A Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 406, 409 (1964); Homburger, *Book Review*, 112 U. PA. L. REV. 1222, 1227 (1964); Note, *Transacting Business As Jurisdictional Basis — Survey of New York Case Law*, 14 BUFFALO L. REV. 525, 539 (1965); Note, *1964 Survey of New York Law*, 16 SYRACUSE L. REV. 199, 430 (1964). *Accord*: Note, *The Virginia "Long-Arm" Statute*, 51 U. VA. L. REV. 719, 732-33, 737 (1965); Note, *Personal Jurisdiction Over Non-Residents — The Louisiana "Long-Arm" Statute*, 40 TULANE L. REV. 366, 376-77 (1966).

II.

New York's Exercise Of Nonresident Jurisdiction In The Marital Relations Field Is Unprecedented And If Left Uncorrected Promises To Extend The Reach of State Long-Arm Statutes to The Most Insignificant of Personal Activities.

This case raises in fresh context the question of federal due process limitations on state extension of judicial jurisdiction over nonresident natural persons. Heretofore extension of such jurisdiction over natural persons under state long-arm statutes or their precursors has been approved in some commercial situations by analogy to the rationale underlying those cases supporting assertion of jurisdiction over foreign corporations. Extension of jurisdiction to nonresident natural persons also has been approved in some tort situations on the theory that an outsider whose act causes harm in the forum may be reasonably subjected to judicial process.[20] Considerations of commercial convenience, accessability, availability of other forums and of fairness to plaintiffs affected by the acts of outsiders have supported these extensions of jurisdiction.

The present case presents the novel situation of an attempt by a state to exercise jurisdiction over a nonresident natural person who has neither engaged in tortious conduct affecting the plaintiff's interests nor engaged in commercial conduct affecting or primarily related to the cause of action sought to be aserted by the plaintiff. In short, the present case calls upon the courts to decide the question not heretofore raised as to whether a broadly worded long-arm statute can apply to a nonresident person in his ordinary, casual, personal relationships — here marital rela-

[20] Hess v. Pawloski, 274 U.S. 352 (1927).

tionships — when those relationships involve in some way a plaintiff's interests.

Although the instant case involves a novel fact situation on the frontier of constitutionally sanctioned jurisdiction over nonresidents, the case is not novel in the sense that the issue can be said to be unique and likely to appear infrequently. Negotiation and signing of marital separation agreements across state lines is a common practice. This plus the fact that long-arm statutes of most states are broadly worded and are keyed more to developing due process standards than to legislative history confining their reach to prescribed fact situations[21] warrants the conclusion that although the instant case is one of first impression, it involves an issue which is likely to arise frequently and affect the interests of many persons in many states. Under a broadly worded long-arm statute unrestricted by legislative history which speaks only of doing an act which affects a plaintiff's interests, the dimension of state jurisdiction over nonresident natural persons is coterminous with the judicially described or judicially developed bounds of federal due process.

The dimensions of the constitutional question can be quickly sketched. The starting point is this Court's statement in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945), that:

> Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the

[21] New Jersey authorizes service on foreign corporations by mail but "subject to due process". N.J.R.R. 4; 4-4(b) (1958). Rhode Island declares that every nonresident "that shall have the necessary minimum contacts with the state of Rhode Island shall be subject to the jurisdiction of the state of Rhode Island . . . in every case not contrary to the provisions of the constitution or the laws of the United States." Rhode Island General Laws § 9-5-33,-34 (1960).

> suit does not offend "traditional notions of fair play and substantial justice" . . .

With such a guide, it is apparent that there can be no pat formula to determine the particular activities necessary to support jurisdiction. But to say that the question is one of degree does not mean that it is wholly at large. Thus, the decisions of this Court in *International Shoe* and *Hanson v. Denckla*[22] require not only that an "act" be done within the forum state but that such act reflect a conscious purpose on the part of the actor to exercise "the privilege of conducting activities within [the] state." 326 U.S. at 319; 357 U.S. at 253. And in *Travelers*[23] and *McGee*,[24] this Court stated that the acts done must not be "isolated" or "irregular" but rather must have "substantial" connections with the state.[25] 339 U.S. at 648; 355 U.S. at 223. The question presented by this case goes beyond any holding of the Court: Whether the eased jurisdictional requirements synthesized from and heretofore applied only in commercial and tort settings may be applied with full force to ordinary citizen activities, and specifically to marital relationships.

Petitioner's activities in New York consist of no more than the execution of a marital separation agreement at a time when he resided in Maryland and his then-wife was living in New York. There is no indication that it was at his insistence or suggestion that such an agreement be

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[22] 357 U.S. 250 (1958).

[23] Travelers Health Association v. Virginia, 339 U.S. 643 (1950).

[24] McGee v. International Life Insurance Company, 355 U.S. 220 (1957).

[25] To these requirements this Court has added a caveat: that some single or isolated acts "because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the [nonresident] liable to suit." International Shoe Co. v. State of Washington, 326 U.S. at 318.

entered into,[26] no indication that he or any attorney or agent of his engaged in any negotiations with Respondent in New York over the terms of this agreement; and no indication that in signing the agrement in New York he was doing other than either ceding to a request or serving the convenience of his wife, or performing this task in the course of his travels or work elsewhere. The contrary intimations by the court below are simply without support in the record. Under the circumstances and considering that this separation agreement accorded him no rights or privileges beyond what would be his in its absence, Petitioner's activity in New York was not self-serving and can not be characterized as "purposeful" as that word has been applied by this Court. In *International Shoe, Travelers* and *McGee*, the commercial activities engaged in by the nonresident companies were ostensibly in pursuit of profit and, with the possible exception of the International Life Insurance Company, evidenced an intent to establish an identify in the respective states. Given these facts, it was no long step to the conclusion reached that those companies purposefully availed themselves of the privilege of conducting activities there. But in the present case where Petitioner's contacts with New York arose solely because his wife happened to be there at the time, it seems too long a step to the same conclusion. The decision below is thus in conflict with this Court's refusal in *Hanson v. Denckla* to sustain the exercise of jurisdiction over a Delaware trust company which did not initiate a relationship with the Florida settlor in Florida and whose contacts with that state arose solely from the fact that the settlor moved there after creating the trust in Delaware.

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[26] Indeed, it is more likely that it was prompted by and intended to settle the separate maintenance suit filed by Respondent in the Supreme Court for Nassau County, New York (R. 6).

Furthermore, the record in this case does not reveal the "substantial contacts" with New York required to sustain jurisdiction. Except for signing the agreement and depositing escrow money in New York, Petitioner has not been shown to have had any contacts in that state. As noted, no negotiations appear to have been conducted there. There is no evidence, moreover, that alimony and support payments were even mailed there, or that visitation with Petitioner's daughter, Maria, were made there, or that Respondent and Maria lived there during the interval between the signing of the agreement and the filing of this suit, or even that the alleged extraordinary medical expenses were incurred while there.[27] In short, isolated is the only adjective appropriate to describe Petitioner's activities of record in this case.

Not only is the ruling below unsupported by established precedent, it is also unsupported by the principles which have been developed in support of extensions of state jurisdiction over nonresidents with respect to commercial and tort matters. The seminal theme running through the cases which have broadened the extension of jurisdiction over nonresidents in commercial matters is that we have virtually become one nation for purposes of commerce. Needs of the integrated national business system are presumed to call for freer forum policies. But this case is not a commerce case. Special considerations also explain and support expansion of jurisdiction regarding nonresident tortfeasors: one whose careless conduct has visited unantici-

[27] The escrow account with Fahnestock & Co. was established purely for the benefit of Respondent — an act merely subsidiary and ancillary to the separation agreement. It does not appear to have resulted from any negotiations carried on or arrangements made by Petitioner while in New York and does not appear to have required after its establishment any significant activity on the part of Petitioner in New York.

pated harm on another has little basis for having his convenience weighed heavily in the matter of a forum, and indeed to deny a home forum to the tort plaintiff may operate to compound the wrong done. Consideration of neither the need of the commercial community nor the social interest in prompt redress of torts supports the Respondent in this case.

Granted the force of *International Shoe* and *McGee* and the propriety of the rulings of those cases on their facts, state lines do remain significant for jurisdictional purposes in most subject matter fields other than commercial and tort acts. We have not begun to approach a constitutional principle that *any* act in the state subjects the actor to personal jurisdiction in that state for a cause of action somehow related to the act. As trenchantly phrased in *Hanson v. Denckla*, 357 U.S. at 251, after referring to the liberalizing jurisdictional trend evidenced by *International Shoe* and *McGee*:

> But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . .
> Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limits on the power of the respective States.

The operation of these words of caution of this Court in *Hanson* has been demonstrated, especially in the domestic relations field, by such cases as *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957), *Armstrong v. Armstrong*, 350 U.S. 568 (1956), and *May v. Anderson*, 345 U.S. 528 (1953). See also the comments concerning the utility of retaining traditional jurisdiction rules in the domestic relations field. Briggs, *Contemporary Problems in Conflict of Laws: Jurisdiction By Statute*, 24 OHIO ST. L.J. 223, 262-67 (1963).

The prevalence of long-arm statutes in other states restricted only by federal due process consideration makes it imperative that this Court determine whether, if at all, state court jurisdiction over nonresidents may be broadly extended into the domestic relations field on the basis of acts such as the signing of a marital separation agreement. Only a decision by this Court can forestall confusion and a future burden of litigation on this issue in many states.

Conclusion

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1966

APPENDIX A

COURT OF APPEALS OF MARYLAND

(No. 99, September Term, 1965)

Andre van Wagenberg

v.

Aino van Wagenberg

Opinion of the Court

(Filed January 12, 1966)

Argued before Hammond, Horney, Oppenheimer, Barnes and McWilliams, JJ.

Oppenheimer, J., delivered the Opinion of the Court.

This appeal from a judgment entered in the Circuit Court for Somerset County on a judgment previously entered by the Supreme Court for New York County, New York, involves questions under the full faith and credit and due process of law clauses of the federal constitution and the construction of a New York statute. No testimony is involved; the facts before us are those disclosed by the pleadings and court records and are undisputed.

Andre van Wagenberg, the appellant, (the husband) and Aino van Wagenberg, the appellee, (the wife) were married in Washington, D.C., on May 24, 1943. Their only child, Maria Theresa, (the daughter) was born on August 5, 1946. The family lived in Somerset County until marital difficulties arose, when the wife moved to Nassau County, New York, taking the daughter with her. There, the wife instituted an action for separation.

On April 25, 1952, the husband and wife entered into an agreement (the agreement) executed in the office of a law

firm in New York City. The agreement gave the husband's residence as Princess Anne, Maryland, and that of the wife as Long Island, New York. It recited the marriage and separation of the parties and the institution of the wife's action for separation. It provided that the wife should have exclusive custody of the daughter and that the daughter's residence was to be with her mother. The husband agreed to pay $325 a month for the wife's support and maintenance, unless the parties were divorced and the wife remarried, and $175 for the support and maintenance of the daughter, until her attainment of majority, marriage or death.

Paragraph SECOND (d) reads as follows: "In addition to the sums hereinabove specified, the Husband shall pay all extraordinary and unusual medical expenses of the child arising from serious accidents or serious illnesses." To secure these payments, Paragraph FOURTH of the agreement required the husband to maintain on deposit with Fahnestock & Co., a New York investment brokerage house, $2000 in cash or marketable securities and to authorize Fahnestock & Co. to pay the wife her monthly allotment out of such funds upon presentment by her of a sworn statement that such allotment was at least fifteen days overdue. In the event of a withdrawal from the account by the wife, or a decline in the market value of any deposited securities below the stipulated $2000 figure, the husband was to make additional contributions sufficient to restore the fund to the full amount provided for.

The agreement provided that it was not to be merged in any order or decree in any divorce proceeding, although its provisions might be incorporated in any such order or decree, but was to continue in full force and effect between the parties.

Prior to the execution of the agreement, and evidently while the wife's proceeding for separation was pending in New York, the husband had instituted a divorce proceeding against the wife in Somerset County, Maryland. After the agreement had been signed in New York, the wife filed a cross-bill in the Maryland proceeding. On June 2, 1952, the Circuit Court for Somerset County dismissed the hus-

band's bill and granted the wife a divorce *a vinculo*. The court, in its decree, provided for the support and maintenance of the wife and daughter in the terms set forth in the agreement.

In August, 1954, the daughter contracted infantile paralysis. In April, 1963, the wife filed a complaint against the husband in the Supreme Court of the State of New York, County of New York. In her complaint, the wife alleged she was a resident of the City and State of New York and that the husband was a resident of Princess Anne, Maryland. She recited the terms of the agreement and the Maryland divorce decree, copies of both which were filed as exhibits. The complaint alleged that, because of the daughter's infantile paralysis, it was necessary that she have four operations and special nursing care, and that the extraordinary medical expenses incurred by the wife on behalf of the daughter totalled $25,000 to date, of which the husband had paid only $6,500. The wife asked judgment for the remainder of the expenses, in the sum of $18,500.

Pursuant to Sections 302(a)(1) and 313 of the New York Civil Practice Law and Rules, a copy of the complaint was served upon the husband in Princess Anne on September 13, 1963, by a Maryland attorney. The husband filed no answer and entered no appearance of any kind in the New York case, either in person or by attorney. On November 19, 1963, the case was tried in the New York court before Justice Streit, without a jury, and judgment rendered for the wife for $18,500 plus interest and costs. The judgment recites that the action is for breach of an express contract, that the husband is a non-resident of New York, and that the summons and complaint were served on him personally without the State. It also recites that "a warrant of attachment granted in the action has been levied on the property" of the husband.

The wife filed suit on the New York judgment in the Circuit Court for Somerset County on December 26, 1963, and moved for summary judgment. The husband filed an affidavit in opposition to the wife's motion in which he set

forth that he had not been personally served with process in the New York proceeding in the State of New York, and claimed that the New York judgment is invalid as a judgment *in personam* and is not entitled to full faith and credit in Maryland. After further procedural pleadings, not here relevant, Judge Prettyman granted the wife's motion for summary judgment, and the husband appealed.

The husband contends first, that he has the right to contest the validity of the New York judgment, despite the full faith and credit clause; second, that the New York Legislature in enacting Section 302(a)(1) of the New York Civil Practice Law and Rules did not intend to include the execution of a separation agreement within the meaning of the jurisdictional phrase "transact any business"; and, third, that if the New York Civil Practice Law be construed contrary to this contention, then the assertion of jurisdiction over him by the New York court was unconstitutional as a deprivation of due process of law.

I.

Under the full faith and credit clause of Article IV, § 1 of the federal constitution, and the act of Congress, 28 U.S.C. § 1738, the duly attested record of the judgment of a state is entitled to such faith and credit in every court within the United States as it has by law or usage in the state from which it is taken, and if it appears on its face, as here, to be a record of a court of general jurisdiction, its jurisdiction over the cause and the parties is presumed. *Adam v. Saenger*, 303 U.S. 59, 62 (1938) and cases therein cited; *Roach v. Jurchak*, 182 Md. 646, 650, 35 A. 2d 817 (1944). However, in a suit upon the judgment of another state the jurisdiction of the court which rendered it is open to judicial inquiry; if there was no jurisdiction, the judgment is not entitled to faith and credit. *Adam v. Saenger, supra*, at 62; *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 469 (1874); *Johnson v. Johnson*, 199 Md. 329, 335. 86 A. 2d 520 (1952); Restatement, *Judgments*, § 5 and comment d (1942); Goodrich, *Conflict of Laws*, §§ 72 and 209 (4th ed. 1964); Rashid, *The Full Faith and Credit Clause:*

Collateral Attack on Jurisdictional Issues, 36 Geo. L.J. 154 (1948).

If the court of the state rendering the judgment sued upon was not authorized by that state to exercise its jurisdiction in the particular matter, the purported judgment is subject to collateral attack. The power of the state (Maryland) in which the suit on the judgment of the sister state (New York) is brought, to examine into whether, under the New York law, the court of that state which rendered the judgment had authority to do so, is beyond question. *Treinies v. Sunshine Mining Co.,* 308 U.S. 66, 78 (1939); *Magdanz v. District Court of Woodbury County,* 222 Iowa 456, 269 N.W. 498 (1936); *Ellis Chalmers Mfg. Co. v. Lewelling Grain Co.,* 141 Kan. 350, 41 P. 2d 1032 (1935); *Traders Trust Co. v. Davidson,* 146 Minn. 224, 178 N.W. 735 (1920); *Folger v. Columbian Ins. Co. & Trustees,* 99 Mass. 267 (1868). "[T]he fact that a state has judicial jurisdiction to do a certain thing does not mean that any court of that state has power to do it * * * the fact that the court acted beyond the authority vested in it by the state may make the judgment void where rendered and therefore not entitled to recognition and enforcement elsewhere." Restatement (Second), *Conflict of Laws,* § 74, comment g, (Tent. Draft No. 3, 1956). See also *Goodrich, supra,* § 79 and 3 Freeman, *Judgments,* §§ 1370, 1389 (1925).

The husband is not barred from collaterally attacking the validity of the New York judgment by the doctrine of *res judicata.* He filed no answer and made no appearance of any kind in the New York proceedings. *Sutton v. Leib,* 342 U.S. 402, 408-09 (1952). Compare *Sherrer v. Sherrer,* 334 U.S. 343, 351 (1948) and *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 375 (1940). Compare, also, *Colby v. Colby,* 217 Md. 35, 141 A. 2d 506 (1958) and *Leatherbury v. Leatherbury,* 233 Md. 344, 196 A. 2d 883 (1964).

Not only did the husband not appear in any way in the New York proceedings, but the determination as to the jurisdiction of the New York court depended upon questions of law — the construction and constitutionality of the

statute of the state under which the court acted. Those issues were not litigated. See Restatement, *Judgments*, § 10 comment b.

We hold that the judgment of the New York court is open to collateral attack by the husband in the Maryland action on that judgment.

II.

The New York statute involved is § 302 of the New York Civil Practice Law and Rules (the statute) effective September 1, 1963. It reads as follows:

"§ 302. *Personal jurisdiction by acts of non-domiciliaries*

(a) *Acts which are the basis of jurisdiction.*

A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

1. transacts any business within the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. owns, uses or possesses any real property situated within the state.

(b) *Effect of appearance.*

Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section."

The question before us is whether the term in (a) 1. "transacts any business within the state" applies to the execution by the husband of the agreement in New York, under the attendant circumstances. The husband contends that the jurisdictional phrase should be construed as limited

to activities which are essentially "commercial" in the sense of endeavoring to make a financial profit and as excluding marital separation agreements.

As Justice Gray remarked in *Folger, supra,* "We cannot speak with the same confidence of the intention and the policy of the legislature of another state as we might of those of our own." Unlike the federal courts, we cannot refer the question of law to the state where it originated. See *Aldrich v. Aldrich,* 375 U.S. 249 (1963) and annots. 94 L. ed. 879 (1949) and 3 L. ed. 2d 1827 (1959).

We have the benefit, however, of three recent decisions of the New York Court of Appeals construing the relevant portion of the statute, although none of these decisions involved a question such as that before us. All three dealt with the applicability of the statute to foreign corporations. The three decisions are reported together as *Longines-Wittnauer Watch Co. v. Barnes & Reinecke,* 15 N.Y. 2d 443, 209 N.E. 2d 68, 261 N.Y.S. 2d 8 (1965). The first case, *Longines,* was an action by a New York corporation against a Delaware company, with its place of business in Illinois; the court found that the defendant had engaged in "purposeful acts" in New York sufficient to meet "the liberal statutory criterion." (at 457). In *Feathers v. McLucas,* the plaintiffs had brought a tort action for injuries sustained as a result of the explosion in New York of a tank manufactured by the foreign corporation in Kansas; the court held that the language of paragraph 2, conferring personal jurisdiction over a non-domiciliary which, in person or through an agent, commits a tortious act within the state, did not include the commission of a tortious act without the state which causes injury within it. Judge Fuld, who delivered the three opinions, pointed out that the New York statute was modeled upon a similar Illinois statute, and that, in a corresponding situation, the Illinois court, in *Gray v. American Radiator & Sanitary Corp.,* 22 Ill. 2d 432, 176 N.E. 2d 761 (1961), had held the tort was committed in Illinois for the purposes of the jurisdictional statute. The New York court, however, disagreed with the Illinois court's interpretation. The third case was *Singer v. Walker, cert. denied* 34 U.S.L. Week 3160 (U.S. Nov. 8, 1965), which also involved an alleged tort of a foreign corporation. There,

a child, a resident of New York, had been injured, in Connecticut, by a hammer manufactured in Illinois by an Illinois corporation, and sold by a dealer in New York to the child's aunt. The court held that jurisdiction could not be sustained under paragraph 2, but that there was jurisdiction under paragraph 1 on the ground that the appellant had transacted business within New York and the cause of action was one "arising" therefrom.

It is the analysis of the genesis and purpose of the statute in Judge Fuld's opinion which we find particularly enlightening in the consideration of the problem before us. He pointed out that:

> "The standard for assessing the irreducible minimum forum activities constitutionally requisite to subject foreign corporations and non-resident individuals to personal jurisdiction was reformulated in the cases of *International Shoe Co. v. Washington* (326 U.S. 310) and *McGee v. International Life Ins. Co.* (355 U.S. 220). By those decisions, the Supreme Court opened a broad and previously unavailable — although still largely undefined — area for state exercise of jurisdiction over such parties. In place of the former rigid tests of 'residence' and 'doing business', the Supreme Court, in *International Shoe,* substituted the flexible requirement that a nonresident defendant, against whom a judgment in personam is sought in the forum state, be shown merely to 'have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice" ' (326 U.S., at p. 316." 15 N.Y. 2d at 451.

He quoted from *Hanson v. Denckla,* 357 U.S. 235, 253 (1958), that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." (at 451-52).

Judge Fuld traced the history of the enactment of the statute as follows:

> "In enacting section 302, the Legislature chose not to fix precise guidelines, as other states have done, so

as to draw within the jurisdictional reach of the New York courts *only* contracts 'made within this State' (Md. Ann. Code, art. 23, § 92, subd. [d]) or contracts 'made in this State or to be performed in this State' (N.C. Gen. Stat., § 55-145, subd. [a], par. [1]) or contracts 'to be performed in whole or in part by either party in [this State]' (Minn. Stat. Ann., § 303.13, subd. 1, par. [3]; Tex. Rev. Civ. Stat. Ann. [Vernon], art. 2031b; § 4; Vt. Stat. Ann., tit. 12, § 855). The Advisory Committee which drafted the section took cognizance of such statutes in its report (N.Y. Advisory Comm. Rep. [N.Y. Legis. Doc., 1958, No. 13], pp. 39-40) and decided, instead, to follow the broad, inclusive language of the Illinois provision, adopting as the criterion the 'transact[ion of] *any* business within the state'. The design of the legislation, as expressed by the committee, was to take advantage of the 'new [jurisdictional] enclave' (*Bomze v. Nardis Sportswear*, 165 F. 2d 33, 36, per L. HAND, J.) opened up by *International Shoe* where the nonresident defendant has engaged in some purposeful activity in this State in connection with the matter in suit. (See N.Y. Advisory Comm. Rep. [N.Y. Legis. Doc., 1958, No. 13], pp. 39-40; see, also, 1 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 302.06)." 15 N.Y. 2d 456-57.[1]

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[1] In Gilliam v. Moog Industries, Inc., 239 Md. 107, 210 A. 2d 390 (1965), we referred to the enlargement of Maryland's jurisdiction over persons outside the state, effective June 1, 1964, Code 1957, (1965 Supp.) Art. 75, Secs. 94-100. Sec. 96(a) provides, in virtually the same language as the New York statute, that a court "may exercise personal jurisdiction over a person or corporation who acts, directly or by an agent, as to a cause of action arising from the person's: (1) transacting any business in this State * * *" Judge Hammond, for the Court, said, as to the new statute:

> "It seems clear that the purpose of the Legislature in enacting these new provisions was to give the courts of the State personal jurisdiction over all out of state persons and corporations which constitutionally could be reached as having had sufficient Maryland contacts, under the jurisdictional yardstick established by the Supreme Court in cases such as International Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95; McGee v. International Life Ins. Co., U.S. 220, 2 L. Ed. 2d 223; and Hanson v. Denckla, 357 U.S. 235, 2 L. Ed. 2d 1283." 239 Md. at 111.

Again, at 460, the Judge said:

> "* * * [T]he draftsmen of section 302 pointedly announced that their purpose was to confer on the court 'personal jurisdiction over a non-domiciliary *whose act in the state* gives rise to a cause of action' or, stated somewhat differently, 'to subject non-residents to personal jurisdiction *when they commit acts within the state*'. (See N.Y. Advisory Comm. Rep. [N.Y. Legis. Doc., 1958, No. 13], pp. 37, 39; emphasis supplied.)"

We find it significant that, in applying "the plain language of the statute and the expressed design of those who drafted it" Judge Fuld repeatedly referred, not to commerce or transactions for profit, but to *acts* done within the state. He emphasized that the legislature had not confined the jurisdictional reach *only* to contracts made within the state, and that the design of the statute was to assert jurisdiction over any "purposeful activity" in the state. There is a strong inference, in his analysis, that the phrase "transaction of any business" includes, but is not limited to, contracts of any kind made within the state, and "purposeful activity" of any kind, within the state.

In discussing the facts in the three cases, the Judge necessarily referred to commercial transactions for these were the acts involved, but the analysis of the purpose, history and meaning of the statute which preceded the particularized consideration of the cases contains no such limitation. While in *Feathers* the New York court refused to go as far as had Illinois in the construction of the language of paragraph 2, the basis of the distinction was that it was the commission of an act within the state which was determinative. The consideration of the constitutional power of the legislature to include injuries resulting from tortious acts committed without the state is not relevant to the question involved in this section of our opinion, which concerns not constitutional power but legislative intent. As the New York court indicated, the failure of the

New York legislature to include jurisdiction over the situation presented in *Feathers* was a matter of choice, not constitutional limitation. "[I]t could have made explicit provision for such situations as some states have done * * *" 15 N.Y. 2d at 461. But *Feathers* emphasizes that it is the commission or non-commission of an *act* within the state which governs.

That the execution of the agreement here involved was an act done within the state of New York is not in dispute. Not only was the agreement executed in the state but the covenants requiring payments by the husband to the wife, for herself and the daughter, were to be fulfilled in that state. As security for the performance of the husband's obligations, a sum of money or securities were to be left in the state, in the custody of a New York investment brokerage house, and if the designated amount of the deposit was depleted, the husband obligated himself to make additional payments to the New York firm. These are business transactions. The New York suit resulted from the husband's alleged failure to make the additional payments to the wife, in New York, for which the agreement provided, to meet the extraordinary medical expenses of the daughter, who, the agreement further provided, was to be in the custody of the wife, a resident of New York. Clearly, the wife's cause of action arose from the act of the husband in executing the agreement and in failing to perform his obligations thereunder.

An agreement of the nature here involved is a legal act of the most serious nature. Unlike a marriage ceremony, which creates a status, or a divorce, which terminates a status, the agreement sounds in contract. The contract is specific and definite; by its express terms, it is not to be affected by any subsequent judicial action in divorce proceedings. The contractual nature of a separation agreement, as distinguished from the personal obligations inherent in the status of marriage, was recognized in England

in the jurisdictional conflict between the ecclesiastic and civil courts.[2]

Judge Prettyman said in his opinion in the court below: "The Court has reached the decision, as stated in Black's Law Dictionary, that the word [business] has no specific or legal meaning, and that it is a very comprehensive term embracing everything about which a person may be engaged." It may well be that it is because "business" is not a word of art that the New York court used the term "act" so consistently in its discussion of the meaning of the statute.

The agreement on which the New York judgment was obtained, as above noted, employs terms and deals with matters commonly associated with business — the payment of money, in stated amounts, the provision for the payment of additional money in certain, expressly defined

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[2] "From the canonical point of view marriage was a sacrament creating an indissoluble relation. The duties attaching to that relation were 'of the highest possible religious obligation' and paramount to the will of the parties. In ecclesiastical Courts an agreement or provision for a voluntary separation present or future was simply an agreement to commit a continuing breach of duties with which no secular authority could meddle, and therefore was illegal and void.

"For a long while all causes touching marriage even collaterally were claimed as within the exclusive jurisdiction of those Courts * * * But the common law, when once its jurisdiction in such matters was settled, never adopted the ecclesiastical theory to the full extent. A contract providing for and fixing the terms of an immediate separation is treated like any other legal contract * * * In Hunt v. Hunt [4 D. F. J. 221 (1861-62)] the husband was restrained from suing in the Divorce Court for restitution of conjugal rights in violation of his covenant in a separation deed * * *" Pollack, Contracts, at 286-87 (13th Ed. 1950).

In Hunt v. Hunt, Lord Westbury said, at 238-39: "Such is the doctrine of the Ecclesiastical Courts, but the relative obligations of fulfilling the duties of a marriage contract, which are the basis of this ecclesiastical doctrine, the common law leaves to the conscience of the parties concerned. It regards a deed of separation as any other legal contract. If the covenant of the husband not to sue for restitution, which is a release of the right to compel cohabitation, be founded upon a valuable consideration, an action may be maintained upon it as upon any other legal covenant."

circumstances, and the creation and maintenance of an escrow fund. That the agreement was the result of negotiations between the husband and wife or their counsel is inherent in its nature; the contract was executed in a lawyer's office and is obviously drafted by attorneys. The inevitable preliminary negotiations, like the agreement itself, involved financial affairs. No profit was involved for any one, but, absent an express decision of the New York Court of Appeals to the contrary, we are reluctant to believe that the New York legislature, in enacting this statute, did not intend to protect its citizens as to the results of acts within the state which, however important in nature to the New York residents, did not involve a profit.

In *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) in holding constitutional a California statute which subjects foreign corporations to suit in California on insurance contracts with residents of that state even though the corporations could not be served with process within its borders, the Supreme Court referred to California's manifest interest in providing effective means of redress for its residents. That case involved the due process clause rather than the interpretation of the statute, but it enunciates the purpose of a state in extending within constitutional limits its jurisdiction over non-residents. See also, *Compania de Astral v. Boston Metals Co.*, 205 Md. 237, 261-64, 107 A. 2d 357 (1954) *cert. denied* 348 U.S. 943 (1955) and authorities therein cited, and *Nelson v. Miller*, 11 Ill. 2d 378, 384, 143 N.E. 2d 673 (1957). New York has made abundantly clear its concern with the support of resident wives and children. Like most of the states, including Maryland, it has enacted a uniform support of dependants law (N. Y. Domestic Relations Law §§ 30-43), and in Penal Law § 480, makes a parent who abandons a child and wilfully omits to furnish necessary support guilty of a felony. The agreement here involved, executed in New York, provides for the support of wife and child in accordance with New York law. The State of New York, as well as the wife and daughter, has an interest in the husband's fulfillment of his agreement. To hold that this statute providing for jurisdiction over non-residents

was not meant to include the husband on the facts here involved, because his contract was not a transaction in a commercial marketplace or did not look to the making of a profit, in our opinion, would be to ignore New York's manifest, particular interest in the subject matter of the transaction.

In their scholarly briefs and argument, counsel for the husband contend that the legislative history of the New York statute shows that the term "transacts any business" is only a legislative liberalization of the "doing business" test, and that the statute was not intended to extend the basic "doing business" test into non-commercial areas of activity. They cite the history of the "doing business" test in the decisions of the Supreme Court, and point to the fact that the common denominator of the cases sustaining jurisdiction, even in the enlarged concept of the later cases, was commercial. The difficulty with this argument is that while the subject matter of the Supreme Court decisions, which enlarged the concept of the extent to which a state could constitutionally make non-residents subject to its jurisdiction, consisted of transactions entirely commercial in nature, there is nothing in these decisions which limits the broadened concept to such transactions. As *Longines* makes clear, the present test of whether a state can exercise jurisdiction over non-residents without violating due process is only that the non-resident defendant have such minimal contacts with the state that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." The test does not limit jurisdiction to contacts which have their roots in the market-place as opposed to contacts by acts within the state not actuated by the motive of profit. While the development of the criterion came about in cases in which corporations were involved, there is nothing in the letter or spirit of the standard which confines it to activities in which only business enterprises engage.

The term "transaction of any business" is generic and vague. As we have seen, the agreement in this case involves definite elements of a business nature. Paragraph 1 of the

statute is not limited in terms to commercial transactions nor does it contain an exclusion of transactions not entered into for profit. Our study of the *Longines* decisions persuades us that it is the doing of an act — with the necessary contact in the state — which is determinative, and that the legislative history and the plain meaning of the statute show that it includes within its reach acts such as are here involved.

The husband's attorneys place strong reliance upon the case of *Willis v. Willis*, 42 Misc. 2d 473, 248 N.Y.S. 2d 260 (1964). That case was decided by the same court in which the wife in this case obtained her judgment in New York, after the judgment in issue in this case had been rendered. In *Willis*, the court decided, contrary to the prior decision of the same court (although not the same judge) that the execution of a separation agreement in New York between husband and wife did not constitute the transaction of business in the state within the meaning of the statute and that, in a suit by the wife to have the agreement set aside or enforced, service on the non-resident husband outside the state was invalid. *Willis* was decided before *Longines*, and, as in the New York suit of the wife in the present case, no appeal was taken.

The decision of a court not of last resort in other jurisdictions, while entitled to respect, is not determinative of the law of the state in which the decision is rendered. *Briggs and Co. v. District of Columbia*, 196 F.2d 241, 243 (D.C.Cir. 1952); *Given v. Owen*, 73 Okl. 146, 175 P.345 (1918). See also *United States v. Raynor*, 302 U.S. 540, 551-52 (1938).

The court in *Willis* gave three reasons for its decision. First, the opinion states that it does not appear to have been the intent of the draftsmen of the statute to expand the exercise of jurisdiction to the "outer limits of permissible jurisdiction" (at 474). However, that intent, as *Feathers* makes clear, only precludes the results of action taken out of the state as a basis for jurisdiction; it does not go to the construction of the statute as to what action taken within the state gives jurisdiction. As we have said, to us, the

Longines decisions strongly indicate that it is the doing of an act within the state which is determinative. *Willis* cites the Second Preliminary Report of the Advisory Committee on Practice and Procedure (1958) in support of its conclusion, but that report states, at 39, that it is the intent of the proposed statute (later enacted) "to take advantage of the constitutional power of the state of New York to subject non-residents to personal jurisdiction when they commit *acts* within the state." (Emphasis supplied). Second, the *Willis* opinion states that its approach is governed by the general rule that, in the construction of statutes, approaches should be utilized which do not raise constitutional questions; no decision is cited, and we have found none, that a construction of the statute as giving jurisdiction in the case here involved would raise any greater or different constitutional question than would be present if the statute, in terms, were restricted to acts which involve the making of money. Third, the court says that, in its opinion, "the intendment and contemplation of the verbiage" of the statute was in respect of transactions which have a commercial aspect. (at 475) we have previously indicated the reasons why we disagree with such a construction if it would exclude the transaction here involved. *Willis* was followed, without discussion in *Durgom v. Durgom*, 47 Misc. 2d 513, 262 N.Y.S. 2d 874 (1965).

The New York statute has also been construed in Massachusetts, prior to *Longines*, in a situation similar to that before us, and the application of the statute to a non-resident husband who entered into a separation agreement with his wife in New York was upheld. *Spitz v. Spitz*, ... Mass. App. Dec. ..... (16 Legalite 278) (March, 1965) (The reporter of this case was evidently not available at the time of the argument in the present appeal.) In that case, the parties had been living in New York, but after the execution of the separation agreement, the husband came to Massachusetts where he was served with the summons in the New York action brought by the wife. Suit on the New York judgment obtained by the wife was brought in Massachusetts; the lower court refused the

husband's plea in abatement and the Appellate Division affirmed. The court said:

> "Whether an arrangement whereby one lives apart from his wife and family and leaves the state of their residence can be designated 'doing business' is beside the point. The expression is not a term of art, and the reports of our highest courts reveal the great difficulty experienced in explaining it. See: *International Shoe Co. v. Washington,* 326 U.S. 310. What does matter is that a course of action inextricably involved in the status and legal responsibilities of the defendant is going on in the state of New York. The jurisdiction of the courts of New York over such a situation is by no means casual. The State of New York can, if it so desires, invoke criminal sanctions to enforce the claims of this plaintiff on the defendant. There is a strong social interest in the security of family life."

We hold that the husband's activities in New York brought him within the scope of the statute, if the statute, so construed, is constitutional.

III.

Whether the statute, as we have construed it, is constitutional depends on whether the entering of the judgment of the New York court against the husband, who was not served with process within that state's boundaries, violates his rights under the due process clause of the Fourteenth Amendment. *McGee v. International Life Ins. Co., supra,* 355 U.S. at 222. As the New York court pointed out in *Longines,* at 458, the criteria in determining the validity of extraterritorial jurisdiction for claims relating to acts done within the state are whether the transaction upon which the suit is based had "substantial connection" within the state, *McGee,* at 223; whether the appellant's "contacts" within the state were such "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945), and whether the appellant "purposefully avail[ed] itself of the privilege of conducting

activities within * * * [the] state" and thereby "invok[ed] the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). A comprehensive study of the development of these criteria is contained in *Developments in the Law — State-Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960).

As to corporations, a single transaction within the state, given fulfillment of the other jurisdictional requisites, has been held sufficient to sustain the constitutionality of the service upon a foreign corporation, under the test of due process. *Astral, supra; The Dahlberg Co. v. Western Hearing Aid Center, Ltd.*, 259 Minn. 330, 107 N.W.(2d) 381, *Cert. denied*, 366 U.S. 961 (1961). In *Longines-Wittnauer v. Barnes & Reinicke, supra*, in which jurisdiction over the foreign corporation was upheld, while a supplemental agreement was executed in New York, the contract on which the breach of warranty suit was based had been executed in Illinois.

The same rule, in general, applies to individuals. In *International Shoe Co.*, the Supreme Court said, at 319: "That clause [due process] does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties or relations." To support his conclusion that in order to subject a defendant to a judgment *in personam* if he be not present within the territory of the forum, due process requires only certain minimum contacts within it, Mr. Chief Justice Stone cited, *inter alia*, *Millikin v. Meyer*, 311 U.S. 457 (1940) and *Hess v. Pawloski*, 274 U.S. 352 (1927) in which the defendants were natural persons.

"[I]t would seem that the same considerations of fairness and the nature of the defendant's activity in the state which are utilized in determining jurisdiction over corporations should be equally applicable when the defendant is a natural person." *Calagaz v. Calhoon*, 309 F. 2d 248, 255 (5th Cir. 1962). See also Foster, *Personal Jurisdiction Based on Local Causes of Action*, 1956 Wis. L. Rev. 522 and 73 Harv. L. Rev., at 935-48.

In *Hess*, the Supreme Court held constitutional a Massachusetts statute subjecting non-residents to extraterritorial jurisdiction for disputes arising out of the operation of motor vehicles on the state's public highways, because of the state's power to regulate local acts dangerous to life and property. In *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935), the Court held constitutional an Iowa statute subjecting non-resident dealers in securities to the state's jurisdiction for claims related to local securities transactions, largely because of the state's strong interest in regulating businesses involving securities. In *Astral*, Chief Judge Brune, for the Court, said, 205 Md. at 258:

> "The non-resident motorist cases have shattered any argument to the effect that a single transaction by a non-resident may not be made the basis for amenability to suit in the state where the transaction occurred. The *Doherty & Co.* case has rendered untenable any contention that a contract made within a state cannot serve as the basis for suit in that state against a non-resident party to the contract."

He further said that, particularly in view of the later Supreme Court decisions, the fact these cases involved applications of the police power did not necessarily mean that service on a foreign corporation based upon a contract executed in Maryland was invalid. See also 73 Harv. L. Rev. at 947, and Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 Iowa L. Rev. 249, 258-60 (1959).

The husband contends that, even though the execution of the agreement in New York may be held sufficient to give the New York court valid jurisdiction if the other constitutional requisites are present, the jurisdictional controls required in the case of an individual are more substantial than in the case of a corporation. In support of this contention, he cites a dictum of Chief Judge Brune in *Astral*, at 262, that "in the case of foreign corporations a less rigorous standard may suffice than in the cases of individuals"; Reiblich, *Jurisdiction of Maryland Courts Over Foreign Corporations Under the Act of 1937*, 3 Md. L. Rev.

35, 71 (1938); and 73 Harv. L. Rev., at 936. We do not reach the question of whether the contacts and intent of a non-resident individual defendant in respect of the state in which judgment is rendered must be greater than those of a foreign corporation; for, in our opinion, assuming, *arguendo*, the correctness of the assumption, on the facts here involved, every criterion of jurisdiction is met.

It has been said that:

> "Manifestly, when personal jurisdiction is asserted against a non-resident of the state solely on the ground that the action brought is related to a contract having substantial local contacts, those contacts are at a maximum where (1) both parties were present in the state when the contract was made; (2) the contract was to be performed wholly within the state; and (3) the facts constituting the breach took place within the state. But the examination to be made will also consider whether less than all the contracts just stated may suffice to sustain personal jurisdiction." 1956 Wis. L. Rev., at 565.

Here, both husband wife were present in New York when the agreement was signed; the payments for which it provided were to be made to the wife in New York since the agreement stated she was a resident of that state; the escrow fund was deposited in New York and was to be maintained there; and the facts constituting the breach (failure of the husband to pay for the extraordinary medical expenses incurred on behalf of the daughter, also a resident of New York) took place in New York; it was in that state that the husband failed to support the daughter in accordance with the agreement.

There are additional substantial connections which the husband had in New York, before and at the time of the execution of the agreement. He was not domiciled in the state, but his wife and daughter lived there. He purposefully availed himself of the privilege of conducting activities within the state and invoked the benefits and protections of the New York laws when he agreed to make and did make the escrow deposit with the New York invest-

ment brokerage house for which the agreement called. Under New York law, dealers in securities are subject to regulation for the protection of the members of the public which do business with them. N.Y. General Business Law, §§ 352-359-h. In *Astral*, Chief Judge Brune, at 261-62, referred to the establishment of an escrow fund by the non-resident defendant as one of the factors which added up "to considerable contact with this State and considerable reliance upon its laws and the protection which they afforded."

New York has a manifest interest in the support and maintenance of its infant residents. As the Massachusetts court noted in *Spitz v. Spitz, supra,* criminal sanctions are available to effectuate the New York public policy.

The husband's "contacts" with New York were such that the maintenance of the New York suit did not offend traditional notions of fair play and substantial justice. The service of the husband outside of New York's territorial limits, did not, on the facts here involved, constitute an infringement of due process of law.

Judgment Affrmed; Appellant To Pay The Costs.

APPENDIX B

In The

Circuit Court for Somerset County,
State of Maryland

No. 2813 Civil Cases

Aino van Wagenberg,

vs.

Andre van Wagenberg.

OPINION AND ORDER OF COURT

(Filed March 15, 1965)

On December 26, 1963, the Plaintiff filed her Declaration in this proceeding based upon an exemplified copy of a judgment, and the proceedings relating thereto, obtained in the Supreme Court of the State of New York, for the County of New York on December 2, 1963. The judgment was in the amount of eighteen thousand six hundred twenty-nine dollars and ninety-six cents ($18,629.96). The judgment was obtained in New York as the result of a suit by the Plaintiff herein against the Defendant herein filed apparently in accordance with Section 302 of the New York Civil Practice Act. The Defendant did not appear or answer the complaint filed in New York State, although personal service of the summons and complaint had been made upon him in Princess Anne, Somerset County, Maryland, on September 13, 1963, by Thomas S. Simpkins, Esquire, an Attorney at Law in the State of Maryland, and allegedly one of the persons entitled to make such service as required by the provisions of the law of the State of New York. The proceeding in the State of New York was

founded upon an Agreement entered into between the parties hereto in the State of New York on April 28, 1952, as apparently prepared by Regan & Barrett, Attorneys and Counselors at Law, 120 Broadway, New York 5, New York. The Agreement is an elaborate ten-page contract resolving such matters of dispute between the parties as custody of the child born to the parties during wedlock, rights of visitation with the child, support and maintenance for the wife, support and maintenance for the child, extraordinary and unusual medical expenses of the child, the discharge of sizeable obligations already then incurred by the wife for the support of the child, counsel fees for the wife, certain provisions respecting the testamentary disposition of the husband, the establishment of a perpetual indemnity escrow fund by the husband with a brokerage firm in the State of New York, the settlement of existing and future property rights of the respective parties, including the incurring of future obligations and the waiver of testamentary rights, certain rights with respect to litigation which might arise in the future, and provisions with respect to the amendment of the written agreement.

On the second day of June, 1952, the parties were divorced a vinculo matrimonii by the Circuit Court for Somerset County, Maryland, the same being No. 6742 on the Chancery Docket of the said Court. The Decree of the Court, among other matters, repeated certain provisions from the aforesaid Agreement, dated April 25, 1952, and also included the following statement:

> "And it is further adjudged, ordered and decreed that the provisions of an agreement executed by Andre H. A. M. van Wagenberg and Aino Pusta van Wagenberg, dated April 25, 1952, copy of which is filed with the proceedings in this case, is hereby ratified and made part of this decree",

When the Plaintiff filed her Declaration in this present proceeding, at the same time, she filed a Motion for Summary Judgment. On January 17, 1964, the Defendant filed his Affidavit in Opposition to Plaintiff's Motion for Summary Judgment, alleging the invalidity of the judgment in

personam obtained by the Plaintiff in the State of New York, and claiming payment of all sums of money for which he was obligated under the terms of the Divorce Decree heretofore referred to in Case No. 6742 on the Chancery Docket of this Court. On the same date, he filed a Demand for Particulars, to which the Plaintiff filed a Motion Ne Recipiatur, declaring nothing to particularize in view of the exemplified copy of the judgment from the State of New York. Thereafter, on February 27, 1964, the Defendant filed a motion to transfer the present proceedings to the Equity side of this Court, to which, on March 4, 1964, the Plaintiff filed an answer to such motion alleging, among other things, no equitable jurisdiction and the failure of the Defendant to comply with Rule 515 of the Maryland Rules of Procedure. On March 31, 1964, the above enumerated motions came on for a hearing, after which time was granted for the filing of briefs and supplemental memoranda by counsel.

In the research and thoughtful consideration of the issues raised in this proceeding, this Court, like Odysseus, has wandered long and far. The word "wandered" is used advisedly. It is apparently agreed that the New York law establishing the procedure utilized in this case in the State of New York became effective only on September 1, 1963, to the end that, therefore, the case between the parties hereto must have necessarily been one of the first cases to be filed thereunder in the State of New York. In addition, a similar statute was not enacted in the State of Maryland until April 7, 1964, becoming effective June 1, 1964, with no opportunity for a case filed thereunder to have yet been considered by the Court of Appeals of Maryland. It is apparent that the law with regard to in personam jurisdiction over non-domiciliaries is changing and evolving rapidly. In order to resolve the fundamental issue here involved, however, this Court is of the opinion that the test to be applied is that enunciated by the Supreme Court of the United States in International Shoe Company v. State of Washington, 326 U.S. 310, and as adopted and applied in Thomas v. Hudson Sales Corp., 204 Md. 450; Compania de Astral S.A. v. Boston Metals Company, 205 Md. 237:

> ". . . due process requires only that in order to subject a Defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice . . ."

Such was the law applied by Judge Watkins in Baltimore Lumber Company, Inc. v. Marcus, 208 F. Supp. 852, construing Maryland law.

The application of this principle of law pre-supposes the determination by the Court that the business upon which the Defendant was engaged in the State of New York was such as to fall within the purview of those acts enumerated in Section 302 of the New York Civil Practice Act. The making of such a determination resolves itself merely into a decision as to the meaning of the words "transacts any business". This Court has made exhaustive research in connection with the definition of the word "business" and associated phrases. From this research, the conclusion is inescapable that the definition applied in the respective cases, numerous as they are, has depended upon the context and the circumstances then at issue. As one Georgia Judge has said, apparently at the end of a maze similar to that experienced by this Court:

> "The definitions of the word 'business' are legend, multiplied throughout English and American jurisprudence to such an extent that definitions of the word favorable to any view of any controversy may be found". Lamar Electric Membership Corporation v. Carroll, 79 S.E. 2d 832, as quoted in the 1964 Cumulative Supplement to C.J.S. "Business" p. 140, note 78.

Finding no precise precedent upon which to rely in the case at bar, the Court then, by force, turned to the standard and recognized lexicographers for aid and assistance. The Oxford Universal Dictionary defines "business" as "the state of being busily engaged in anything", and the word "busy" as "occupied with constant attention; actively engaged". Webster's New International Unabridged Dictionary, Second Edition, gives these various definitions:

"The quality or state of being busy, solicitude or attentiveness; care; diligence; industry; disturbance; trouble; ado; fuss, activity".

"That which one may rightfully or justifiably concern himself or meddle with". That which busies or engages time, attention, or labor as a principal serious concern or interest".

"Affair; matter; concern".

It defines "busy" as "engaged in some action on which one is intent; actively at work (either habitually or only for the time being); occupied with serious affairs; not idle or at leisure". The Court has reached the decision, as stated in Black's Law Dictionary, that the word has no specific or legal meaning, and that it is a very comprehensive term embracing everything about which a person may be engaged. It is admitted by the Court that this is the context in which the word is generally used by the average person in day-to-day conversation and expression, and that it is therefore used as distinguished from the word "pleasure". When the activities of the Defendant in the State of New York preparatory to the execution of this Agreement of April, 1952, the execution of the agreement, and the subsequent activities by, or on behalf of, the Defendant anticipated by the Agreement to take place in the State of New York are analyzed in their true and reasonable light, one cannot escape the conclusion that this was "business" of concern to the Defendant of the very highest order. It is true that the activity was not in pursuit of profit from gainful employment or occupation, but it cannot be denied that it affected valuable property and property rights and the distribution of wealth and income. It must be further conceded by all parties that there exists no matter of greater concern to any man than that of the custody, support and maintenance of his children, their health, their education, their welfare, and his right to visit with them in order to share their love and affection. This was the "business" about which the Defendant was engaged so elaborately in his contacts in the State of New York preceding, contemporaneously with, and subsequent to the

contractional relationship entered into between the parties on April 25, 1952. This is the "business" defined by the lexicographer.

The Defendant raises the question that this is but a single and isolated transaction which, in any event, would not subject him to the jurisdiction of the State of New York under the pertinent statute. This Court cannot agree that we deal here with only a single and isolated transaction. It is perfectly apparent that the presence of the Defendant in the State of New York was not by accident, nor were his activities, subjecting him to jurisdiction, happenings of chance. It is perfectly clear that his presence in the State of New York, for this purpose, was planned; that the subject Agreement was obviously preceded by negotiations; that the said Agreement was the result and product of such negotiations; that the Agreement was prepared and executed in the State of New York; that, upon the date of execution of the said Agreement, the Defendant did have dealings with Fahnestock & Company in the City of New York; that either prior to, on that date, or immediately subsequent thereto, the Defendant must execute certain Agreements with Fahnestock & Company with regard to the establishment of an escrow fund; that the Defendant, while in the State of New York, would be required to select certain marketable securities from his portfolio, or purchase the same, to establish the escrow fund contemplated by the Agreement; that the Defendant would, from time to time in the future, be required to make further deposits into the fund, or receive certain payments therefrom, requiring continual contact with Fahnestock & Company by the Defendant; and that the Defendant would, in the future, be visiting the State of New York continually in order to visit his child who resides there. The Agreement stands only as evidence of the many and varied aspects of the activities of the Defendant in the State of New York, and not as an isolated or single transaction.

It remains but to question, therefore, whether or not these activities constitute sufficient minimum contacts with the State of New York in order to comply with what this

Court has already stated, in its opinion, to be the controlling rule of law. Without restating such contacts, which appears unnecessary in view of what has already been said, the Court is of the opinion that the test has been met and that the maintenance of the suit in the State of New York, under these conditions, "does not offend traditional notions of fair play and substantial justice". As an aside, the Court might remark in passing that the Defendant seems to concede that the individual States may acquire jurisdiction on the basis of a single act by a non-resident when he is engaged in an activity that may be treated as exceptional and subject to special regulations. It seems to this Court that the doctrine of *parens patriae* is as fundamental and ancient as any doctrine which might be invoked for the exercise of jurisdiction over matters of special interest to the State.

The Defendant has vigorously pressed for the application of the doctrine of merger in this case. The Court believes it unnecessary to reach a decision on that question. As stated in the summary of the facts early in this Opinion, the Decree of the Chancellor in the divorce proceeding in Somerset County, Maryland, ratified, and made a part thereof, the subject Agreement. By doing so it ratified and adopted all of the terms of that Agreement. By reference to page 8 of the Agreement, it will be seen that the question of merger was anticipated. A portion of Paragraph NINTH reads as follows:

> "The provisions of this Agreement may be incorporated in any such judgment, order or decree, but it is expressly understood and agreed that this Agreement shall not be merged in any such order, decree or judgment, but shall continue in full force and effect between the parties hereto, and shall survive any such order, decree or judgment, and shall remain valid and binding upon the parties hereto".

The application of the doctrine of merger, therefore, both by reason of contract and judicial decree is not available to the Defendant.

The remaining inconsequential question pertaining to the Demand for Particulars will be resolved in the following fashion by this Court. The Motion Ne Recipiatur filed by the Plaintiff, in order to save time, will be considered as an Exception to the demand therefor. Rule 346 of the Maryland Rules of Procedure provides that a party may demand particulars "Whenever a pleading is so general as not to give sufficient notice to him of the claim . . . asserted . . ." It is the opinion of this Court that the Declaration was not of such a general nature. The Bill of Particulars could have done no more than restate the judgment rendered in the State of New York. If that judgment is entitled to full faith and credit, as this Court finds it to be, the Defendant has no right to "go behind" that judgment.

Accordingly, it is, this 5th day of March, 1965, by the Circuit Court for Somerset County, Maryland, ORDERED, that:

1. The Plaintiff's Motion for Summary Judgment be, and it is hereby, granted; and

2. The Plaintiff's Motion Ne Recipiatur be, and is hereby, granted; and

3. That, the Defendant's Motion to Transfer These Proceedings to the Circuit Court for Somerset County, State of Maryland, In Equity be, and it is hereby, overruled; and

4. That the Defendant pay the costs of these proceedings.

DANIEL T. PRETTYMAN,

Judge.

SUPREME COURT, U.S.

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 303

ANDRE VAN WAGENBERG,

Petitioner,

v.

AINO VAN WAGENBERG,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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RESPONDENT'S BRIEF

Statement of the Case

Respondent, the former wife in this domestic relations case, respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari to this Court. The basis for the opposition to this Writ is that no substantial federal question is presented.

The facts are quite simple. Respondent and Petitioner were married on May 24, 1943, and had one child, a daughter (R. 11). The marriage ended in a disagreement; and on April 25, 1952, in the State of New York, Petitioner-husband and Respondent-wife, who was a resident of New York, entered into a Separation Agreement which provided, as here pertinent, that the husband would

pay Respondent the sum of $500.00 a month. As is most pertinent to this Petition, the Agreement further provided that the husband would reimburse his wife for any "extraordinary medical expenses" that their daughter might incur (R. 11-14).

The Separation Agreement, negotiated and signed by both parties in the State of New York, also provided that the husband would set up an escrow account in New York to guarantee certain payments with a New York broker (Fahnestock & Co.) (R. 13).

After the Agreement was signed in New York, the daughter of the parties contracted infantile paralysis (R. 10). As to this, there is no issue, and there is further no issue that the husband, despite repeated demands, has not paid the extraordinary medical expenses for his daughter's medical condition. On April 22, 1963, Respondent-former-wife instituted an action in the State of New York for $18,500.00 to recover upon the agreement for the extraordinary medical expenses that she had spent on behalf of her daughter (R. 8-10). Petitioner, the former husband, was served personally in the State of Maryland (R. 17-18), pursuant to Section 302 of the New York Civil Practice Law and Rules which provides:

"§302. *Personal jurisdiction by acts of non-domiciliaries*

(a) *Acts which are the basis of jurisdiction.*

A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

1. transacts any business within the state * * *".

Petitioner chose not to appear in the New York action, and judgment was entered against him by default on December 2, 1963 (R. 19-20).

Following this default, suit was brought on the New York judgment against Petitioner in Maryland. The Court of Appeals of Maryland, after full consideration, ordered Petitioner to comply with the New York judgment (Petitioner's Brief, Appendix A). It is from this ruling of the highest court of the State of Maryland that the husband now petitions this Court for certiorari.

ARGUMENT

The Petition should be denied for lack of any substantial federal question

In the instant case, despite Petitioner's lengthy Brief, the record is abundantly clear that the issues between the parties have been thoroughly dealt with by the Courts of both New York and Maryland, and that no substantial federal question is presented for this Court to review. The record further shows that the Petitioner-husband, after full notice, not only had his opportunity to be provided with a fair adjudication of whatever his position may have been, but also that the courts of both states thoroughly reviewed the case and found against him.

The record further shows, and there appears to be no dispute whatever from the Petitioner, that he did in fact sign, within the State of New York, an Agreement to reimburse his ex-wife for extraordinary medical expenses, which were incurred for their daughter in her polio illness (R. 11-14).

The instant Petition for Certiorari to this Court, it is respectfully submitted, is a patent attempt to renege on

this written agreement by a father at the expense of his seriously ill daughter.

The reasons stated in the Petition by the father constitute an unwarranted strain at a technicality that does not exist. The judgment obtained in the New York courts is entitled to full faith and credit under the United States Constitution, Article IV, §1, 28 U.S.C., §1728. Pursuant to that constitutional provision, together with Section 302 of the New York Civil Practice Law and Rules, the New York judgment was validly enforced in Maryland. *Longines-Wittnauer Co.* v. *Barnes Reinecke,* 15 N. Y. 2d 451 (1965).

The Petitioner-father, in attempting to evade his obligations to his ill daughter, in his argument to this Court is able only to present an argument that the Separation Agreement did not constitute "transacting business" within the ambit of the New York State statute. As the Maryland Court below painstakingly pointed out, the Legislature in New York has a definite interest in protecting its citizens' rights in transactions occurring within its borders. It did not narrow the transaction of "business" in CPLR §302 merely to coarsely commercial affairs.

This Petition presents no "substantial federal question" under Rule 19 of this Court's Rules. As this Court has often and clearly stated, the key point in determining jurisdiction on petitions from State adjudications is whether "fair play and substantial justice" between the parties has been done. *International Shoe Co.* v. *State of Washington,* 326 U. S. 310 (1945); *McGee* v. *International Life Ins. Co.,* 355 U. S. 220 (1957).

In the circumstances here presented, the Courts below have fairly dealt with Petitioner-husband, who concededly

signed an agreement with his wife to take care of their daughter's extraordinary medical expenses and openly defaulted on that agreement when his daughter contracted polio. The husband was accorded ample notice of the fact of the disease and the amounts of the medical expenses, and defied his agreement to pay them. On the Record in this Petition, "fair play and substantial justice" between the parties have clearly been rendered by the Courts of New York and Maryland.

The husband's Petition to this Court constitutes no more than a final attempt to evade and delay his plain obligation to his family.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari to the Court of Appeals of Maryland should be denied.

Respectfully submitted,

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Entry of Appearance

PLEASE TAKE NOTICE that the undersigned, whose appearance has not previously been entered herein, hereby appears in this Court as attorney for Respondent.

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